IN THE SUPREME COURT OF MISSOURI

UNITED STATES DEPARTMENT OF VETERANS AFFAIRS,	)	
Appellant,	)	SC92541
v.	)	
KARLA O. BORESI, CHIEF ADMINISTRATIVE LAW JUDGE,	)	July 23, 2012
Respondent.	)	

SUBSTITUTE BRIEF OF APPELLANT

RICHARD G. CALLAHAN
United States Attorney

NICHOLAS P. LLEWELLYN
Assistant United States Attorney
Chief, Civil Division

PAUL PETRABORG, Mo. Bar 45742
Special Assistant United States Attorney
1 Jefferson Barracks Dr., Bldg. 25, #308
Saint Louis, Missouri 63125
(314) 845-5050/(314) 845-5057 (fax)
paul.petraborg@va.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution, statutes and regulations

STATEMENT OF JURISDICTION

The Court has jurisdiction over this matter pursuant to § 512.020 RSMo., as the Department of Veterans Affairs ("VA") challenges the final judgment on its Petition for Writ of Mandamus. *See, e.g. Chastain v. Kansas City Missouri City Clerk*, 337 S.W.3d 149, 154 (Mo. App. 2011) ("[W]hen the circuit court denies a petition for writ of mandamus following an answer or motion directed to the merits of the controversy and, in doing so, determines a question of fact or law, we treat the court's ruling as final and appealable.").

STATEMENT OF FACTS

On July 15, 2010, VA, by counsel, filed a motion to intervene as a party in a workers' compensation case pending before the Missouri Labor and Industrial Relations Commission, Division of Workers' Compensation ("DWC"), claim number 02-132243 (Substitute Appendix, pp. A10-11). VA alleged that it provided $18,958.53 in medical care to a veteran as a result of a work injury. VA asserted a right to receive reimbursement for this care "incurred incident to the veteran's employment and . . . covered under a workers' compensation law or plan." (Substitute Appendix, p. A10).

VA further asserted a right to intervene by authority of 38 U.S.C § 1729(b)(2)(A), which authorizes VA to "intervene or join in any action or proceeding brought by the veteran…against a third party…" *Id.* By order dated October 5, 2010, Administrative Law Judge Karla Boresi denied VA's motion on the grounds that she had "no authority to permit intervention" (Substitute Appendix, p. A12).

On January 3, 2011, VA filed a petition for writ of mandamus, requesting that Judge Boresi be directed to rescind her denial of VA's motion, and to enter an order allowing VA to intervene as a party in the case (Substitute Appendix, pp. A1-12). By order dated June 13, 2011, a City of St. Louis circuit judge denied the petition for writ of mandamus, finding that "Relator has not shown a clear, unequivocal, specific right such that mandamus would lie in this matter" (Substitute Appendix, pp. A13-19).

VA appealed the judgment to the Missouri Court of Appeals, Eastern District. By opinion dated March 20, 2012, the court denied VA's appeal, holding that "Because the

employee, Veteran Hollis, would not be entitled to receive payment under Missouri law, the VA's point lacks merit" (Substitute Appendix, p. A20). More specifically, the court stated "because Hollis received unauthorized medical care at the VA's medical facility, under Missouri law he is not entitled to receive any payment from Employer or Employer's insurance company. So even if the VA was allowed to step into Hollis' shoes, the VA would still not be entitled to receive payment. Thus, the federal statute cannot supply the VA with a right to intervene." VA's motion for rehearing and application for transfer were denied by the court April 26, 2012 (Substitute Appendix, p. A24).

VA now petitions this Court for an order allowing VA to participate as a party in the underlying workers' compensation case as a matter of law.

POINT RELIED ON

The trial court erred in denying VA's petition for writ of mandamus, because 38 U.S.C. § 1729 gives VA a right to intervene in a workers' compensation proceeding to assert a claim for medical expenses to the extent the veteran/claimant would have such a right, in that VA provided medical care for the veteran/claimant and properly attempted to assert its right to intervene and request reimbursement.

Dudley v. City of Des Peres, 72 S.W.3d 134 (Mo. App. 2002)

Schneidler v. Feeder's Grain and Supply, Inc., 24 S.W.3d 739 (Mo. App. 2000)

U.S. Const. Art. VI, § 2

38 U.S.C. § 1729

§ 287.140 RSMo.

STANDARD OF REVIEW

The standard of review for writs of mandamus and prohibition, including those pertaining to motions to transfer venue, is abuse of discretion, and an abuse of discretion occurs where the circuit court fails to follow applicable statutes. *State ex rel. City of Jennings v. Riley*, 236 S.W.3d 630, 631 (Mo.banc 2007). In this case, there is a controlling statute permitting VA to intervene in a state workers' compensation proceeding, such that allowing VA to intervene is a ministerial duty imposed by law and the judge's refusal to do so in this case was an abuse of discretion.

ARGUMENT

The trial court erred in denying VA's petition for writ of mandamus, because 38 U.S.C. § 1729 gives VA a right to intervene in a workers' compensation proceeding to assert a claim for medical expenses to the extent the veteran/claimant would have such a right, in that VA provided medical care for the veteran/claimant and properly attempted to assert its right to intervene and request reimbursement.

VA filed a motion to intervene in a Missouri workers' compensation case pursuant to 38 U.S.C. § 1729, which gives VA a right to claim reimbursement for medical expenses in a workers' compensation case "to the extent that the veteran . . . would be eligible to receive payment for such care or services . . ." To assert this claim, VA is authorized to "intervene or join in any action or proceeding brought by the veteran . . . against a third party . . ." The statute further states "No law of any State or of any political subdivision of a State . . . shall operate to prevent recovery or collection by the United States under this section . . ." The lower courts' rulings in this case specifically operate to prevent recovery by VA, and have flouted this federal mandate without discussion.

Further, the Court of Appeals' opinion denying VA's claim states "if the VA was allowed to step into Hollis' shoes, the VA would still not be entitled to receive payment," reasoning that "because Hollis received unauthorized medical care at the VA's medical facility, under Missouri law he is not entitled to receive any payment from Employer or Employer's insurance company . . ." This is a misstatement of well-settled Missouri law,

and clarifying this misstatement is the first step in analyzing VA's claim.

1. Missouri law recognizes that an employee may receive reimbursement for medical expenses that were not authorized by the employer.

By statute, VA is permitted to claim reimbursement for the cost of medical care furnished by VA to a workers' compensation claimant "to the extent that the veteran . . . would be eligible to receive payment for such care or services . . ." 38 U.S.C. § 1729. It is undisputed that the medical care provided by VA in this case was unauthorized. Therefore, as VA stands in the shoes of the workers' compensation claimant, the threshold question is under what circumstances a claimant can receive reimbursement from an employer for unauthorized care.

As the basis for denying VA's claim, the Court of Appeals' opinion incorrectly stated that "because Hollis received unauthorized medical care at the VA's medical facility, under Missouri law he is not entitled to receive any payment from Employer or Employer's insurance company . . ." (Substitute Appendix, p. A23).

Under Missouri workers' compensation law, an employer has a statutory right to select the medical providers to provide treatment to an injured employee. § 287.140.1 RSMo. However, it has been held that this right can be waived if the employer refuses to provide necessary care. *Schneidler v. Feeder's Grain and Supply, Inc.*, 24 S.W.3d 739 (Mo. App. 2000). If that happens, a claimant can seek reimbursement from the employer for the cost of necessary medical care he chooses on his own, again assuming the

employer is aware of the need for care and fails or refuses to authorize it. *See, e.g., Dudley v. City of Des Peres*, 72 S.W.3d 134 (Mo. App. 2002).

In *Dudley*, the employee had knee surgery performed by a physician of his choosing after the employer's physician refused to provide the surgery. *Dudley,* 72 S.W.3d at 136. The court found there was sufficient evidence to conclude that the employer waived its statutory right to provide care, and found that the employee's estate was properly awarded medical expenses. *Id.* at 138. This conclusion is supported by a long line of precedent. *See Schneidler v. Feeder's Grain & Supply, Inc.*, 24 S.W.3d 739, 742 (Mo. App. 2000); *Schuster v. State Div. of Employment Sec.*, 972 S.W.2d 377, 384 (Mo. App. 1998); *Blackwell v. Puritan-Bennett Corp.*, 901 S.W.2d 81, 85 (Mo. App. 1995)(" . . . it is only when the employer fails to do so that the employee is free to pick his own provider and assess those costs against his employer . . ."); *Pruteanu v. Electro Core, Inc.*, 847 S.W.2d 203, 206 (Mo. App. 1993); and *Emert v. Ford Motor Co.*, 863 S.W.2d 629, 631 (Mo. App. 1993)(citing additional precedent back to 1966).

In light of this precedent, the lower court's statement in this case that ". . . because Hollis received unauthorized medical care at the VA's medical facility, under Missouri law he is not entitled to receive any payment from Employer or Employer's insurance company . . ." is an incorrect blanket statement of law, and an improper basis for denying VA's claim.

2. VA has specific statutory authority to intervene in a Missouri workers' compensation case to make a claim for payment of unauthorized medical expenses.

Working from a correct statement of Missouri law that there are situations in which an injured worker can make a claim for payment of unauthorized medical expenses, the next question is what remedy is available to VA. The circuit court opinion overlooked critical language in considering VA's standing to claim reimbursement under 38 U.S.C. § 1729. The judge correctly noted that a private hospital has no authority to intervene in a Missouri workers' compensation case (Substitute Appendix, p. A18). He then stated that because 38 U.S.C. § 1729 gives VA standing to pursue a claim as if it were a private hospital, VA's request to intervene demands status superior to that of a private hospital, "which does not appear to be authorized by 38 U.S.C. § 1729(a)(1)." (Substitute Appendix, p. A18).

What this analysis overlooks is that 38 U.S.C. § 1729(a)(1) provides VA standing to assert a claim for reimbursement by two alternate methods: "to the extent that the veteran (or the provider of the care or services) would be eligible to receive payment . . ." In other words, VA is specifically authorized to pursue reimbursement either (1) as the veteran would be able to, or (2) as a private provider of the care or services would.

Under Missouri law, a private provider of unauthorized medical care does not have a right to participate as a party in a workers' compensation case. Standing in those shoes (prong (2), above), VA admittedly does not either. However, VA claims standing to participate under prong (1) above, namely to the extent the veteran/claimant himself

can litigate the issue of unauthorized medical expenses. As cited at the beginning of this argument, the veteran undoubtedly has standing to make such a claim, and 38 U.S.C. § 1729(a)(1) specifically allows VA to stand in the veterans shoes to make the claim.

The next question is what statutory mechanism is available to allow VA (standing in the shoes of the veteran) to assert a claim. The answer set out in statute is unequivocal: "In order to enforce any right or claim to which the United States is subrogated under paragraph (1) of this subsection, the United States may intervene or join in any action or proceeding brought by the veteran (or the veteran's personal representative, successor, dependents, or survivors) against a third party." 38 U.S.C. § 1729(b)(2)(A). While the plain language of the statute is clear, there is also a clear purpose in providing VA a formal right to intervene.

VA concedes that under Missouri law, the claimant in this case has a right to receive reimbursement for unauthorized medical expenses only if his employer was aware of the need for care, and failed or refused to provide authorization for related, medically necessary care. Neither the employer nor the claimant has provided VA any documentation one way or the other on this issue. If VA is not permitted to intervene as directed by 38 U.S.C. § 1729, VA has no way to compel the parties to produce this information, and is completely dependent on voluntary cooperation of the employee and employer. Forcing VA to pursue its claim in this hat-in-hand manner is contrary to plain statutory language stating ". . . the United States may intervene or join in any action or proceeding brought by the veteran . . ." 38 U.S.C. § 1729.

The issue for this Court is not whether the employee (by VA, standing in his shoes) has a valid claim for unauthorized medical expenses; that issue is for the DWC to decide at an administrative hearing. The issue for this Court is whether VA has standing to intervene to litigate the merits of a claim for unauthorized medical expenses under § 287.140 RSMo. Missouri case law and 38 U.S.C. § 1729 unequivocally answer this question "Yes."

Article VI of the United States Constitution contains what is commonly known as the Supremacy Clause, stating "This Constitution, and the laws of the United States which shall be made in pursuance thereof, . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." U.S. Const. Art. VI, § 2.

On this basis, VA asserts that 38 U.S.C. § 1729 is applicable, binding on the Missouri Division of Workers' Compensation, and acts to provide not only the authority, but acts to provide the duty for an administrative judge to allow VA to intervene as a party in a workers' compensation case. Allowing VA to intervene in this manner calls only for rote application of the plain language of the statute, a ministerial enforcement of the law that is properly the subject of a writ of mandamus.

3. VA's initial pleading was not technically defective, as VA's right to intervene by authority of 38 U.S.C. § 1729 is not dependent on whether VA is ultimately able to prove its right to reimbursement for unauthorized medical expenses.

Respondent has previously argued (and VA agrees, as stated above) that one essential element required to recover unauthorized medical expenses is that the employer must be on notice that an employee needs treatment, and fails or refuses to provide it. VA and Respondent part ways on Respondent's further argument that because VA's motion did not specifically allege that the employer knew of the need for care and failed or refused to provide it, that the motion to intervene was technically deficient, and that the judges were not compelled to grant the motion or the petition for writ of mandamus. However, this argument confuses VA's ultimate burden of proof with the notice pleading required to raise the issue.

It is undisputed that to prevail on a claim under 38 U.S.C. § 1729 ". . . to the extent that the veteran . . . would be eligible to receive payment . . ." VA would need to prove that the employer was on notice of the need for care, and failed or refused to provide it. However, the purpose of the initial pleading is to put the parties on notice of issues by "simple, concise and direct" averments. Mo. Sup. Ct. Rule 55.04. This is particularly so in a workers' compensation proceeding, which are intended to be "simple, informal, and summary, and without regard to the technical rules of evidence." § 287.550 RSMo. It would fly in the face of this policy to deny the VA's claim on such a technicality.

In this case, VA alleged that the claimant was injured at work and received care at VA as a result of his injuries (Substitute Appendix, p. A10). It is implicit in the motion that VA concedes VA was not an authorized provider, but even if there were a case in which VA was authorized and/or had been paid, the employer would certainly present those facts in opposition to a motion to intervene. In every case, the employer should have superior access to that information to defend against a fraudulent or mistaken claim for double payment.

By contrast, VA has no access to information about whether the employer authorized care, or was even on notice of the need for care; the only statements in VA's motion are those for which VA had knowledge to support an allegation. Absent VA access to information about medical authorization, it is conceivably treading on VA counsel's ethical duty of candor to the court to require as a matter of law that VA plead these facts without having any basis to believe them. The logical purpose of language permitting VA to intervene as a party (rather than merely assert a lien on any proceeds) is to permit VA to engage in the discovery vehicles afforded to any other party in the case, and actively litigate its interest at hearing.

VA's initial pleading was sufficient to put the administrative law judge and the parties on notice that it was seeking to assert a claim for unreimbursed medical expenses. It does not make sense as a matter of public policy, fairness or law to require VA to allege facts it has no reason to know, prior to giving VA any authority to investigate those facts. Finally, while VA believes the above argument is dispositive as a general

rule, in this specific case it should further be noted that no judges at any level below have cited a technical pleading deficiency as the reason for denying VA's claim.

4. Forcing VA to invoke an alternative method of recovery would undermine a stated purpose of the Missouri workers' compensation scheme, that workers' compensation proceedings are intended to be "simple, informal, and summary, and without regard to the technical rules of evidence."

The VA collections statute being relied on in this case, 38 U.S.C. § 1729, provides two mechanisms for VA to claim recovery against an employer. One is the basis of this appeal, and if VA is allowed to proceed under that mechanism, VA would have a right to subpoena medical and other records, take depositions, and represent its interests like any other party, all within the scope of the streamlined Missouri workers' compensation rules and procedures. The interests of all parties can be resolved in one proceeding at one time.

VA has an alternate method of recovery available. If no workers' compensation claim is filed within 180 days of the VA care, and the veteran/claimant is given 60 days' notice, VA can file an independent suit in federal district court. 28 U.S.C. § 1345; 38 U.S.C. § 1729(b)(2)(B). While the consequences of such suits are speculative, these suits could result in aspects of the identical incident being litigated in two arenas at the same time, result in technical and lengthy discovery, result in increased legal costs to the employer, chill or delay prospects of settlement, give claimants' attorneys without federal

court experience a disincentive to accept cases that may involve VA, and could easily result in inconsistent findings of fact on central issues like causation or medical necessity.

VA's entire legal argument is based on plain language of a federal statute and well-settled Missouri law, but from the perspective of workers' compensation claimants, employers, judges and attorneys on both sides, there is also a policy argument in support of allowing VA to intervene in state workers' compensation cases as the lesser of two admitted inconveniences. As a legitimate party, VA will have the same incentives as the other parties to resolve cases as quickly and fairly as possible.

CONCLUSION

As stated in 38 U.S.C. § 1729(f), it was Congress' direction that "No law of any State or of any political subdivision of a State . . . shall operate to prevent recovery or collection by the United States under this section." None of the decisions in the lower courts (administrative, circuit, appeals) have addressed the fact that their continued denial of VA's claim is openly thwarting Congress' clear assertion of federal authority under the Supremacy Clause on this issue. U.S. Const., Article VI, § 2. To date and to the contrary, every opinion has been underpinned by misstatements of Missouri and federal law that have "operate[d] to prevent recovery or collection by the United States under this section."

VA is not claiming authority to make any change to substantive Missouri workers' compensation law. Rather VA seeks to assert, by the Supremacy Clause, its federal statutory right to stand in the employee's shoes, subject to Missouri law, on the specific

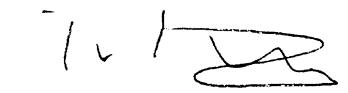
issue of recovery of unauthorized medical expenses.

WHEREFORE, VA respectfully requests a writ of mandamus directing that VA be allowed to intervene in the underlying workers' compensation case as a party (to include receiving notice of case settings as required by the DWC's own regulations at 8 C.S.R. 50-2.010(9)(C)) to assert a claim for unauthorized medical expenses, and for such other relief as this Court deems just and proper.

Respectfully submitted,

RICHARD G. CALLAHAN
United States Attorney

NICHOLAS P. LLEWELLYN
Assistant United States Attorney
Chief, Civil Division



PAUL PETRABORG, Mo. Bar 45742
Special Assistant United States Attorney
Department of Veterans Affairs
1 Jefferson Barracks Dr., Bldg. 25, #308
Saint Louis, Missouri 63125
(314) 845-5050
(314) 845-5057 (fax)
paul.petraborg@va.gov

CERTIFICATE

Pursuant to Rule 84.06(c), the undersigned hereby certifies that this pleading includes the information required by Rule 55.03 and complies with the limitations contained in Rule 84.06(b). The Substitute Brief of Appellant contains 4,895 words according the automated word count function of Microsoft Word.

Pursuant to Rule 84.06(g), the undersigned hereby certifies that the electronic files submitted to the Court have been scanned for viruses by the current version of McAfee virus scanning software, and the attached files are virus free.

Pursuant to Rule 103.08, this Appendix will be served on James Layton, Counsel for Responded, electronically by the Missouri eFiling system.